

Message Text

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TO SECSTATE WASHDC 1282

INFO AMEMBASSY ISLAMABAD

AMCONSUL BOMBAY

AMCONSUL CALCUTTA

AMCONSUL MADRAS

C O N F I D E N T I A L NEW DELHI 12635

E.O. 11652: GDS

TAGS: PINT, IN

SUBJECT: SUPREME COURT HEARING

REF: NEW DELHI 12319

SUMMARY: A SUPREME COURT RULING AGAINST THE CONSITUTIONALITY OF THE 39TH AMENDMENT IS UNLIKELY BUT POSSIBLE. IF THE COURT DOES DECIDE TO REOPEN HER ALLAHABAD APPEAL OR CONVENE A FULL THIRTEEN-MAN BENCH TO RULE ON THE 39TH AMEMDMENT, MRS. GANDHI COULD WAIT FOR THE COURT TO DISPOSE OF HER CASE, COMFORTED BY THE KNOWLEDGE THAT THE ELECTION LAW HAS BEEN AMENDED IN HER FAVOR AND THE ELECTION COMMISSIONER HAS THE POWER TO WAIVE PENALTIES OF THOSE CONVICTED OF ELECTION OFFENSES. TO REGAIN THE INITIATIVE SHE MIGHT INSTEAD CONVERT PARLIAMENT INTO A CONSTITUENT ASSEMBLY OR HOLD ELECTIONS FOR A NEW CONSTITUENT ASSEMBLY. SHE COULD ALSO, OF COURSE, ABROGATE PARTS OF ALL OF THE CONSITUTION ALTHOUGH THIS SEEMS MUCH LESS LIKELY. REGARDLESS OF WHICH WAY THE SUPREME COURT RULES, IT APPEARS LIKELY THAT MRS. GANDHI IS INTENT ON FURTHER LIMITING THE POWER OF THE JUDICIARY. END SUMMARY.

1. A PRELIMINARY SUPREME COURT RULING OR, ALTERNATIVELY, AN AN-CONFIDENTIAL

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NOUNCEMENT THAT THE CONSTITUTIONALITY OF THE 39TH AMENDMENT

WILL BE DECIDED BY A FULL THIRTEEN-MAN BENCH IS EXPECTED NEXT WEEK, ALTHOUGH THE COURT COULD TAKE LONGER TO PRESENT ITS CONCLUSION. THE ESTIMATE OF PEOPLE WHOSE JUDGMENT WE VALUE IS THAT THE COURT WILL ACCEPT THE 39TH AMENDMENT.

2. NEVERTHELESS, THERE REMAIN A NUMBER OF COURSES OPEN TO THE COURT WHICH FALL SHORT OF EXONERATING MRS. GANDHI. IT COULD REJECT THE 39TH AMENDMENT COMPLETELY, OR IT COULD REJECT ONLY THE PORTION EXONERATING MRS. GANDHI, THEREBY REOPENING THE ALLAHABAD APPEAL. THE CHIEF JUSTICE COULD DECIDE TO CALL A FULL THIRTEEN-MAN SUPREME COURT BENCH, EVEN THOUGH THE PRESENT FIVE-MAN BENCH IS A "CONSTITUTIONAL" ONE AND CAPABLE OF DECIDING A CONSTITUTIONAL QUESTION. THE SIGNIFICANCE OF THE QUESTIONS UNDER REVIEW, A THREE-TWO SPLIT IN FAVOR OF MRS. GANDHI, OR A MAJORITY AGAINST HER, COULD LEAD TO SUCH A DECISION BY THE CHIEF JUSTICE.

3. THE AMENDMENTS TO THE INDIAN ELECTORAL LAW PASSED AT THE LAST SESSION OF PARLIAMENT AND THE CONSTITUTIONALLY-BASED POWER OF THE ELECTION COMMISSIONER TO WAIVE PENALTIES OF THOSE CONVICTED OF ELECTORAL OFFENSES PROVIDE SOME GOOD INSURANCE THAT MRS. GANDHI CAN LEGALLY RETAIN THE PRIME MINISTERSHIP. THE PRIME MINISTER HOWEVER, HAS TRADITIONALLY BEEN UNCOMFORTABLE WITH SITUATIONS THAT SHE IS UNABLE TO CONTROL OR TO NEUTRALIZE. SHE PREFERENCES TO TAKE THE INITIATIVE RATHER THAN SIT BACK, PARTICULARLY WHEN HER PERSONAL POWER, POSITION OR PRESTIGE IS ON THE LINE. SHOULD THE COURT STOP SHORT OF EXONERATING HER SHE COULD ADOPT EITHER A LEGAL OR EXTRA-LEGAL COURSE:

4. LEGAL:

A. WAIT: THE PRIME MINISTER COULD WAIT FOR THE SUPREME COURT TO DECIDE HER CASE.

B. CONVERT PARLIAMENT INTO CONSTITUENT ASSEMBLY: THIS WOULD ALMOST CERTAINLY BE CHALLENGED IN THE COURTS. BUT AS WE REPORTED IN NEW DELHI 10916, THE SUPREME COURT IS ON RECORD AS ALLOWING SUCH A COURSE. FURTHER, A NEW CONSTITUTION CALLING FOR A WEAKENED JUDICIARY COULD BE ENACTED BEFORE THE COURTS COULD COMPLETE THEIR CONSIDERATION OF THE CHANGE-OVER.

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C. ELECTIONS AND A NEW CONSTITUENT ASSEMBLY: IN A DRAMATIC MOVE, MRS. GANDHI COULD CALL NEW ELECTIONS HOPING FOR A LARGE MAJORITY THAT WOULD "VINDICATE" HER POSITION, LIMIT THE POLITICAL LIABILITIES OF THE COURT CASE WLD PROVIDE "JUSTIFICATION" FOR A NEW CONSTITUENT ASSEMBLY. AS WE REPORTED REFTL, NEW ELECTIONS MAY BE RISKY. HOWEVER, MRS. GANDHI WOULD ENJOY A NUMBER OF IMPORTANT ADVANTAGES. SHE COULD MAINTAIN A DEGREE OF CONTROL OVER THE PRESS AND POLITICAL ACTIVITY DURING A CAMPAIGN. THE OPPOSITION PARTIES

WOULD HAVE LITTLE TIME TO MOBILIZE THEIR RESOURCES AND NEGOTIATE
A CREDIBLE UNITED FRONT.

5. EXTRA-LEGAL:

A. ABROGATE THE CONSTITUTION: MRS. GANDHI COULD TOSS OUT PARTS OR
ALL OF THE CONSTITUTION AND PRODUCE A NEW ONE GIVING HER WIDER
POWERS. SHE COULD COUNT ON PRESS AND POLITICAL CONTROLS, HER SE-
CURITY AND POLITICAL ASSETS, AND THE GENERAL ACCEPTANCE OF THE
EMERGENCY IN INDIA TO SMOOTH THE TRANSITION. BUT SHE WOULD RISK
A FURTHER WEAKENING OF HER MORAL AS WELL AS LEGAL POSITION. SHE
WOULD ALSO BECOME INCREASINGLY DEPENDENT ON THE SUPPORT OF THE
MILITARY TO STAY IN POWER.

6. WHETHER YEAH OR NAY, THE COURTS WILL BE WEAKENED: OUR A-280
AND NEW DELHI 11162 REPORTED THE PROBABLE STEPS THAT MRS. GANDHI'S
GOVERNMENT PLANS TO TAKE TO ERODE THE POWER AND INDEPENDENCE OF
THE JUDICIARY. RECENT STATEMENTS BY THE PRIME MINISTER, LAW MINIS-
TER GHOKALE. INFORMATION AND BORADCASTING MINISTER SHUKLA PRES-
AGE FURTHER AMENDMENTS TO THE CONSTITUTION SUBSTANTIALLY NARROW-
ING THE AREA OF JUDICIAL REVIEW, ESPECIALLY IN AREAS TOUCHED ON
BY MRS. GANDHI'S 20-POINT SOCIO-ECONOMIC PROGRAM. THE COURT'S
RULING ON THE 39TH AMENDMENT'S CONSTITUTIONALITY WILL BE A GOOD
INDICATION OF HOW MUCH - OR LITTLE - OPPOSITION THE COURTS WILL
GIVE MRS. GANDHI AS SHE MOVES TO NEUTRALIZE THE LAST INSTITUTIONAL
OPPOSITION TO HER CONSOLIDATION OF PERSONAL POWER.
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